of poor presentation, the value of the court's time on one side, and on the other the danger of having almost identical litigation brought up again in the near future. On such considerations, the decision in *Dakota Coal Co.* v. *Fraser* is undoubtedly correct; but if it appeared that the same situation were likely to be repeated soon, there should be nothing to prevent the court's passing on the propriety of granting the injunction. The real problem, however, is not whether to pass on the merits after circumstances have changed; the problem is how to get the appeal to the upper court before those circumstances have changed.[19] Unless appeals are to be abolished altogether,[20] it must be recognized that in a great number of cases a delayed appeal, especially on an interlocutory injunction, is as good as no appeal at all.[21] The question of moot appeals in equity leads to the roots of procedural reform.

THE CONSTITUTIONALITY OF BUILDING LINES FOR AESTHETIC PURPOSES. — How far will the courts go in recognizing the validity of building lines imposed without compensation? An answer to the question is unavoidable in view of the popular demand for building restrictions, zoning systems, and civic improvements in general.

It is clear that the building line deprives the owner of a property right,[1] but it is equally clear that if the restriction can be brought within a proper exercise of the police power, compensation is unnecessary.[2] However nebulous this police power may be, it may fairly be said to extend to the protection of the public health, morals, and safety, and to the promotion of the general welfare.[3] It is true that if property is taken under the right of eminent domain, compensation is a constitu-

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[19] See PRELIMINARY REPORT ON EFFICIENCY IN THE ADMINISTRATION OF JUSTICE PREPARED FOR THE NATIONAL ECONOMIC LEAGUE, 28; Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," 29 REPORTS OF AMERICAN BAR ASS'N, Part I, 395, 409–411; C. W. Eliot, "The Popular Dissatisfaction with the Administration of Justice in the United States," 45 CHIC. LEG. NEWS, 207; R. H. SMITH, JUSTICE AND THE POOR, 2 ed., 19.

[20] See WORKS, JURIDICAL REFORM, 86, for such a proposal. See 33 HARV. L. REV. 326, for comment thereon by Roscoe Pound, and alternative suggestions as to the remedies for slow appeals. See also Roscoe Pound, "Bibliography of Procedural Reform," 11 ILL. L. REV. 451.

[21] For examples of slow appeals see New Orleans Flour Inspectors *v.* Glover, *supra;* Keller *v.* Rewers, *supra.* The Federal Judicial Code makes an attempt to accelerate appeals. See JUD. CODE, § 129; BARNES, FEDERAL CODE (1919), § 894.

[1] For a discussion of what is a taking or deprivation of property, see Old Colony & Fall River R. R. Co. *v.* Inhabitants of Plymouth, 14 Gray (Mass.), 155 (1859); Pumpelly *v.* Green Bay Co., 13 Wall. (U. S.) 166 (1871); Eton *v.* B. C. & M. R. R., 51 N. H. 504 (1872). For a discussion of the nature of property rights, see Everett V. Abbot, "The Police Power and the Right to Compensation," 3 HARV. L. REV. 189. See NOTE, "Actionable Injuries in Street Regulations," 33 HARV. L. REV. 451, 452.

[2] Mugler *v.* Kansas, 123 U. S. 623 (1887); C. B. & Q. Ry. Co. *v.* People, 200 U. S. 561 (1906). See 1 LEWIS, EMINENT DOMAIN, 2 ed., § 6.

[3] Beer Co. *v.* Mass., 97 U. S. 25 (1877); Crowley *v.* Christensen, 137 U. S. 86 (1890); C. B. & Q. Ry. Co. *v.* People, *supra.* It is of course true that the use of the term, "police power" has been attended by an unfortunate confusion of meaning. Its meaning oftentimes raises simply a question of the true limits of legislative power in general. See THAYER, LEGAL ESSAYS, p. 27, note 1.

tional prerequisite.[4] But the police power and eminent domain are distinguishable, in that while the effect of the police power is to restrict a property right because it is harmful, that of eminent domain is to appropriate a property right because it is useful.[5] Since then the object of the building line is to restrict a detrimental use of a part of the land, it is at least in form a result that may be achieved by the police power.

Under this police power, obnoxious business uses of property may be prohibited,[6] other businesses, though not nuisances *per se*, may be excluded from certain districts,[7] business and residential districts may be altogether segregated,[8] and the height of buildings may be limited.[9] So building lines, in so far as they prevent the spread of fire and conduce to the health of the public, seem clearly within the scope of the police power. A recent case reaching this result is therefore unquestionably correct.[10] But in the decision there were intimations that aesthetic considerations were important. It becomes pertinent therefore to inquire whether such considerations alone will justify the imposing of building lines.[11]

Though it is recognized that provisions incidentally aesthetic will not vitiate otherwise valid restrictions,[12] no court, it seems, has yet gone so far as to sustain legislation whose sole object is to promote the aesthetic.[13] Bill board legislation has been sustained on grounds of fire prevention, safety of pedestrians, and the like,[14] and sometimes, it must be admitted, on grounds somewhat forced,[15] but the courts have squarely refused to adopt the aesthetic consideration as alone sufficient.[16] So legislation primarily aesthetic in purpose, which has sought to exclude retail stores

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[4] Monongahela Navigation Co. *v.* United States, 148 U. S. 312 (1893).

[5] Commonwealth *v.* Alger, 7 Cush. (Mass.) 53, 86 (1851); Mugler *v.* Kansas, *supra*; See 1 LEWIS, EMINENT DOMAIN, 2 ed., § 6; see PRENTICE, POLICE POWER, p. 5.

[6] Watertown *v.* Mayo, 109 Mass. 315 (1872); The Manhattan Manuf. and Fertilizing Co. *v.* Van Keuren, 23 N. J. Eq. 251 (1872).

[7] Hadacheck *v.* Sebastian, 239 U. S. 394 (1915); People *v.* Village of Oak Park, 266 Ill. 365, 107 N. E. 636 (1915); Salt Lake City *v.* Western Foundry Works, 187 Pac. (Utah) 829 (1920); Myers *v.* Fortunato, 110 Atl. (Del.) 847 (1920).

[8] Opinion of the Justices, 127 N. E. (Mass.) 525 (1920).

[9] Welch *v.* Swasey, 193 Mass. 364, 79 N. E. 745 (1907), aff'd in 214 U. S. 91 (1909); Cochran *v.* Preston, 108 Md. 220, 70 Atl. 113 (1908); Lincoln Trust Co. *v.* Williams Bldg. Corp., 229 N. Y. 313, 128 N. E. 209 (1920). See 2 DILLON, MUNICIPAL CORPORATIONS, 5 ed. § 696.

[10] Town of Windsor *v.* Whitney, 111 Atl. (Conn.) 354 (1920). See RECENT CASES, p. 434, *infra*.

[11] For a discussion of this general subject, see Wilbur Larremore, "Public Aesthetics," 20 HARV. L. REV. 35; COMMENTS, "Exercise of the Police Power for Aesthetic Purposes," 30 YALE L. J. 171.

[12] Cusack Co. *v.* City of Chicago, 242 U. S. 526 (1917).

[13] See 2 DILLON, MUNICIPAL CORPORATIONS, 5 ed. § 695.

[14] *In re* Wilshire, 103 Fed. (Cir. Ct. S. D. Cal.) 620 (1900); City of Rochester *v.* West, 164 N. Y. 510, 58 N. E. 673 (1900); Gilmartin *v.* Standish-Barnes Co. 40 R. I. 219, 100 Atl. 394 (1917).

[15] See, for instance, St. Louis Poster Adv. Co. *v.* City of St. Louis, 249 U. S. 269 (1919).

[16] City of Passaic *v.* Paterson Bill Posting Co., 72 N. J. L. 285, 62 Atl. 267 (1905); Commonwealth *v.* Boston Adv. Co., 188 Mass. 348, 74 N. E. 601 (1905); People *v.* Murphy, 195 N. Y. 126, 88 N. E. 17 (1909); Haller Sign Works *v.* Physical Culture Training School, 249 Ill. 436, 94 N. E. 920 (1911). But see FREUND, POLICE POWER, § 182. Churchill *v.* Tait, 32 Phil. 580 (1915), *contra*.

from residential districts,[17] to promote the architectural symmetry of neighboring buildings,[18] or to impose building restriction to preserve fine views [19] has uniformly been held unconstitutional. And building line schemes whose only object was the aesthetic have also been held unconstitutional.[20]

Now granting that the police power is a dynamic thing, it is submitted nevertheless that the results reached by the courts are correct. To the great mass of people irregular building lines or glaring bill boards are matters of trivial annoyance. Except to the small minority, the unsightly view is but a slight irritation as compared with noisome smells [21] or nerve-wracking noises,[22] which have fallen under the taboo of the police power. It is true that disregard of a building line may lessen the value of the neighboring property, but so may the well-meant but freakish design of an adjacent house; and at any rate restrictions for the benefit of the neighbor's property savor dangerously of private eminent domain.

But though an unaesthetic use of property may not be such a public annoyance as to warrant its restriction by the police power, it does not follow that there is not a sufficient public use to justify a taking by eminent domain. The very fact that the police power is exercised without compensation necessitates its more rigid limitation.[23] So, though the police power has never been exercised for aesthetic purposes alone, the same cannot be said of eminent domain. In the well-known case of *Attorney General* v. *Williams*,[24] a statute was sustained as valid which by eminent domain limited building heights to enhance the beauty of Copley Square. And a New York case [25] has held that the land included within the building lines is really a part of the street, and is subject to an easement of light and air in favor of the public. Thus the individual receives compensation for the property right of which he is deprived, but the public at the same time gets what it wants.

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[17] People *v.* City of Chicago, 261 Ill. 16, 103 N. E. 609 (1913); Willison *v.* Cooke, 54 Colo. 320, 130 Pac. 828 (1913); *cf.* Calvo *v.* City of New Orleans, 136 La. 480; 67 So. 338 (1915).

[18] Bostock *v.* Sams, 95 Md. 400, 52 Atl. 665 (1902); State, *ex rel.* Sale *v.* Stahlman, 81 W. Va. 335, 94 S. E. 497 (1917); *cf.* Ingraham *v.* Brooks, 111 Atl. (Conn) 209 (1920).

[19] Quintini *v.* Mayor of City of Bay St. Louis, 64 Miss. 483, 1 So. 625 (1887); Farist Steel Co. *v.* City of Bridgeport, 60 Conn. 278, 22 Atl. 561 (1891).

[20] City of St. Louis *v.* Hill, 116 Mo. 527, 22 S. W. 861 (1893); Fruth *v.* Board of Affairs of the City of Charleston, 75 W. Va. 456, 84 S. E. 105 (1915); City of Buffalo *v.* Kellner, 90 Misc. 407, 153 N. Y. S. 472 (1915).

[21] The Manhattan Manuf. & Fertilizing Co. *v.* Van Keuren, *supra.*

[22] State *v.* White, 64 N. H. 48, 5 Atl. 828 (1886); *Ex parte* Foote, 70 Ark. 12, 65 S. W. 706 (1901).

[23] See Opinion of the Justices, 127 N. E. (Mass.) 525, 528 (1920). See FREUND, POLICE POWER, § 514.

[24] 174 Mass. 476, 55 N. E. 77 (1899). *Cf.* also the following cases in which property was taken for an aesthetic purpose, Parker *v.* Commonwealth, 178 Mass. 199, 59 N. E. 634 (1901), (restricting height of buildings near state capitol); Higginson *v.* Inhabitants of Nahant, 11 Allen 530 (1866); and Petition of Mt. Washington Road Co., 35 N. H. 134 (1857), (building of roads for purely scenic purposes).

[25] *In re* City of New York, 57 App. Div. 166, 68 N. Y. S. 196 (1901); *cf.* People *v.* Calder, 89 App. Div. 503, 85 N. Y. S. 1015 (1903); Northrup *v.* City of Waterbury, 81 Conn. 305, 70 Atl. 1024 (1908); Benedict *v.* Pettes, 85 Conn. 537, 84 Atl. 332 (1912). *Cf.* also State *v.* Houghton, 176 N. W. (Minn.) 158 (1920), in which a statute was sustained, which restricted by eminent domain the building of apartment houses in certain districts of the city.

Now of course no qualities of finality ought to be attributed to such a solution. Obviously as civilization advances, the public aesthetic sense will become more and more compelling. But for the present, it is believed that restrictions only with compensation will best strike a balance of convenience between the social interest in the individual's freedom of self-assertion, and the social interest in an attractive and well-ordered community.

DATE AT WHICH RATE OF EXCHANGE SHOULD BE APPLIED. — Whenever money is due in a foreign country, whether on a note, or as damages for a breach of contract, it becomes necessary to determine its equivalent in domestic currency.[1] There was a tendency on the part of early decisions to disregard commercial rates of exchange, and make the computation on the basis of the nominal par value of the two currencies,[2] determining this, for example, by the weight of gold in the standard coin of each country. Fortunately, the law increasingly adapted itself to the custom of trade, and it became established that commercial rates of exchange would be followed.[3] But the courts had their attention centered on upholding commercial exchange as against conversion at the nominal par, rather than on the question of the precise date at which the rate should be taken. In general, England adopted the date of breach,[4] and the United States that of judgment,[5] though it often is not apparent, in the early decisions, which date the court regarded as decisive.[6]

To-day, however, attention is centered on this latter point, for the rate of exchange may double in the months between breach and judgment, as it did in *Di Ferdinando* v. *Simon, Smits & Co.*[7] After some vacillation,[8] England has now definitely adopted the date of breach, whether contracts or negotiable instruments [9] are involved, and regard-

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[1] This necessity is practically inherent in our judicial system. See SEDGWICK ON DAMAGES, 9 ed., § 274.

[2] Martin *v.* Franklin, 4 J. R. (N. Y.) 124 (1809); Adams *v.* Cordis, 8 Pick. (Mass.) 260 (1829); Chumasero *v.* Gilbert, 24 Ill. 651 (1860).

[3] Scott *v.* Bevan, 2 B. & Ad. 78 (1831); Marburg *v.* Marburg, 26 Md. 8 (1866).

[4] Scott *v.* Bevan, *supra.* See note 6, *infra.*

[5] Marburg *v.* Marburg, *supra.* Hawes *v.* Woolcock, 26 Wis. 629 (1870). Similarly Canada adopted the date of judgment. Crawford *v.* Beard, 14 U. C. C. P. 87 (1864). For the problem in international arbitration, see The Pious Fund of the Californias, Hague Arbitration Cases, Oct. 14, 1902. (J. B. SCOTT, HAGUE COURT REPORTS, 1; G. G. WILSON, HAGUE CASES, 1.)

[6] An interesting example of this is Scott *v.* Bevan, *supra.* It is always cited as a leading case, but sometimes on one side, sometimes on the other. Thus the Divisional Court treated it as a decisive authority for the date of judgment in Cohn *v.* Boulken, 36 T. L. R. 767 [1920 K. B.]. Two weeks later the Court of Appeals, in another case, considered it carefully, and pronounced it to be a clear authority for the date of breach. Di Ferdinando *v.* Simon, Smits & Co., [1920] 3 K. B. 409.

[7] [1920] 3 K. B. 409. See RECENT CASES, p. 435, *infra.*

[8] See Kirsch *v.* Allen, Harding & Co., [1919] W. N. 301 (King's Bench). This case was never followed, and has now been overruled by the Court of Appeals in Di Ferdinando *v.* Simon, Smits & Co., *supra.*

[9] At present there is, as to bills of exchange, an authority *contra* in Cohn *v.* Boulken, *supra.* But that decision was directly based on an interpretation of Scott *v.* Bevan now declared erroneous by the Court of Appeals. See note 6, *supra.*